In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 348

EDWARD J. KRYSTOFORSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1965 (Pet. App. 11). A petition for rehearing was denied on June 19, 1965 (Pet. App. 11-12). The petition for a writ of certiorari was filed

on July 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that three co-defendants had pleaded guilty deprived petitioner of a fair trial.

2. Whether the evidence disclosed a single conspiracy to purchase and sell counterfeit money.

3. Whether the court erred in reading the indictment to the jury at the outset and later paraphrasing it in its charge.

STATEMENT

A one-count indictment returned in the United States District Court for the Eastern District of Michigan charged petitioner and five others (Weikert, Wolke, Slavens, Spaulding and Gillard) with conspiracy to violate 18 U.S.C. 473 in connection with the purchase and sale of counterfeit obligations of the United States (App. 2a-4a).[1] The first trial started on January 10, 1963, at which time Slavens and Weikert entered pleas of guilty. A mistrial was declared because of the illness of Spaulding and two jurors. The second trial began on September 24, 1963, on which date Spaulding pleaded guilty, and an order of dismissal was entered as to Gillard on motion of the government (Pet. App. 15). Trial continued against the two remaining defendants (petitioner and Wolke), and the jury found them both

[1] "App." refers to the Joint Appendix in the court of appeals.

guilty (App. 1a). The court sentenced petitioner to imprisonment for three years and six months under 18 U.S.C. 4208(a)(2) (App. 1a). On appeal (App. 1a) the conviction was affirmed (Pet. App. 11).

The government's case was proved by testimony of Trowbridge, who acted as an informant, Secret Service agent Morrow, and co-defendant Slavens. The evidence showed that on or about November 11, 1961 Slavens met Trowbridge in a Detroit tavern and offered to sell him counterfeit money for use in Indiana. Trowbridge answered that he was not interested (App. 6a-7a, 25a, 46a). After reporting this incident to the United States Secret Service and acting under government instructions, Trowbridge told Slavens he had changed his mind and wanted to make the purchase (App. 7a-9a). At this meeting either Slavens or Weikert introduced Trowbridge to petitioner as "part of the organization." Petitioner said that the counterfeit currency was excellent and could pass for deposit in a bank, and that he had been passing the currency easily in northern Michigan during the deer season, but that Trowbridge would have "jurisdiction" to pass it only in Indiana (App. 9a-10a). At a meeting on November 27, Weikert and Slavens assured Trowbridge that arrangements had been made to have a bundle of counterfeit money sent in and that they would have a sample of the counterfeit for him on November 30 (App. 12a).

On November 30, 1961, Trowbridge introduced Weikert to agent Morrow posing as "Morgan", a bar owner from Elkhart, Indiana who wanted to purchase counterfeit money (App. 12a-14a, 26a-27a).

"Morgan" was introduced by Weikert to petitioner, who was called the "enforcer" (App. 32a, 33a). Weikert told Trowbridge not to worry about Spaulding and Gillard, who were seated at the end of the bar, explaining that the counterfeit from Canada came only in $5,000 packages; that his group was purchasing $3,000 worth; and that Spaulding and Gillard were to purchase the other $2,000 (App. 17a-18a, 23a). Since Trowbridge was upset when Slavens did not appear, Weikert directed Spaulding and Gillard to drive to a lake to pick up Slavens (App. 18a-19a). When Slavens returned with Spaulding and Gillard, he was also introduced to "Morgan" (App. 37a, 48a-49a). After a few telephone calls Slavens learned that there would be a delay in obtaining the counterfeit from Canada. It was agreed that the parties would meet later at a bar in Detroit (App. 19a-20a). Meanwhile Slavens, Wolke and petitioner went to Canada to pick up a sample note (App. 50a). At the subsequent meeting Slavens showed "Morgan" a one hundred dollar counterfeit note in the washroom. When petitioner entered the washroom, "Morgan" put the note in his pocket, but Slaven said to him, "It is all right, it is Ed [petitioner], he is with us on this." When petitioner asked "Morgan" how he liked the note, he answered that it was excellent (App. 40a-41a, 50a). Slavens said he wanted $3,000 from "Morgan" and Trowbridge to purchase the counterfeit in Canada (App. 41a, 48a, 51a).[2] "Morgan"

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[2] The testimony of agent Morrow ("Morgan") was that he was to pay $3,000 in genuine money to purchase approximately $15,000 in counterfeit bills (App. 28a).

then telephoned his superiors to relate that he had observed a counterfeit hundred dollar bill, and that the defendants wanted at least $3,000 and a maximum of $5,000, if possible, sent into Canada to purchase the counterfeit money (App. 41a-42a). Shortly after this the defendants were arrested (App. 43a).

ARGUMENT

The points now urged were not brought to the attention of the court of appeals or the trial judge before they were raised by new counsel in the petition for rehearing. That being so, the court of appeals correctly decided that it was not required to consider them. See *Giordenello* v. *United States*, 357 U.S. 480, 488; *Rugendorf* v. *United States*, 376 U.S. 528, 534. In any event there is no substance to the contentions raised.

1. Evidence, which came in without objection, that three co-defendants had pleaded guilty did not deprive petitioner of a fair trial. The trial court advised the jury that Spaulding had changed his plea from not guilty to guilty, and Slavens testified that both he and Weikert had pleaded guilty (Pet. App. 18).

The court charged specifically that "the fact that one or more of the defendants as here may have pled guilty to the charge, that fact alone should not give rise to an inference of guilt as to the remaining defendants" (App. 61a). The charge also admonished the jury to analyze the evidence against each individual defendant "leaving out of consideration entirely any evidence admitted solely against some other

defendant or defendants" (App. 73a).[3] Since Slavens testified for the government and implicated the other defendants, including petitioner, the jury's knowledge of the pleas of guilty could not have materially altered its views on petitioner's guilt, or detracted from petitioner's defense, which was that, regardless of the guilt of his alleged co-conspirators, he was a mere "tagalong" (App. 52a).

2. Contrary to petitioner's contention, the evidence showed one overall conspiracy to buy and sell counterfeit money, as charged in the indictment. *Blumenthal* v. *United States*, 332 U.S. 539; *United States* v. *Dardi*, 330 F. 2d 316, 321 (C.A. 2), certiorari denied, 379 U.S. 845; *Sigers* v. *United States*, 321 F. 2d 843, 846-847 (C.A. 5). The plan was that the government agent should advance $3,000 to Slavens and that Spaulding and Gillard should advance $2,000 because $5,000 was required as a minimum package to purchase counterfeit money from the Canadian source. Thus, Spaulding and Gillard were to act with Slavens and the other conspirators, including petitioner, to get the money for distribution.

Petitioner took an active part in the conspiracy and was much more than a mere "tagalong" as he contends. He was the "enforcer"; he praised the counterfeit currency; he boasted of having passed

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[3] *Babb* v. *United States*, 218 F. 2d 538 (C.A. 5), and *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3), relied on by petitioner, are distinguishable since in those cases the defendants objected to the evidence as to the co-defendant's plea of guilty and requested, but were refused, such a limiting instruction.

it; and he announced that Trowbridge would have "jurisdiction" to pass the counterfeit only in Indiana. Petitioner also went with Slavens and Wolke to Canada to obtain the sample counterfeit note.

3. There was no error by reason of the court's reading the indictment to the jury at the outset of the case and later paraphrasing it in its charge. This did not result in emphasis of participation by defendants who had pleaded guilty. The court paraphrased the indictment only so that the jury would have it "well in mind" (App. 63a), the task of the jury being to determine whether the charges set forth in the indictment had been proved. In view of the court's charge that the indictment was "not evidence of any kind against the accused and [did] not create any presumption or permit any inference of guilt," that the jurors were to "consider only the evidence in the case," and that it would be a violation of their sworn duty "to base a verdict upon anything but the evidence in the case" (App. 57a, 74a), there was certainly no prejudicial error. *Stephan* v. *United States*, 133 F. 2d 87, 99 (C.A. 6), certiorari denied, 318 U.S. 781; *Blauner* v. *United States*, 293 F. 2d 723, 736-737 (C.A. 8), certiorari denied, 368 U.S. 931.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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REPLY TO BRIEF IN OPPOSITION

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